Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States

PUBLIC UTILITY COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA; DAVID W. ROLKA, CHAIRMAN OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION; JOSEPH RHODES, JR., JOHN M. QUAIN, LISA CRUTCHFIELD AND JOHN HANGER, in their official capacities as members of the PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Cross-Petitioners,

v.

WHEELING and LAKE ERIE RAILWAY COMPANY,

Cross-Respondent.

Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF QUESTION PRESENTED FOR REVIEW

Does the Eleventh Amendment bar enforcement of 49 U.S.C. § 11501 against the States because Congress enacted the statute pursuant to the Commerce Clause?

LIST OF PARTIES

The parties to the proceeding below in addition to those listed in the caption of this cross-petition were Scott Township and James P. Mulligan, Chairman of the Board of Supervisors of Scott Township. Scott Township and James P. Mulligan were separate appellants in the court below.

TABLE OF CONTENTS

	Page
STATEMENT OF QUESTION PRESENTED FOR REVIEW	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
REFERENCE TO OPINIONS DELIVERED IN THE COURT BELOW	2
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT UNDER RULE 29.4(b)	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
This Court Should Grant Certiorari Because the Court of Appeals' Determination That Congress Validly Enacted 49 U.S.C. § 11501, Prohibiting Discriminatory Taxation of Railroads, Pursuant to Section 5 of the Fourteenth Amendment Is Contrary to the Decisions of This Court That Have Held That Discriminatory Taxation of Railroads Does Not Violate the Equal Protection Clause of the Fourteenth Amendment	5
A. History of 49 U.S.C. § 11501	5
B. Recent Eleventh Amendment Decisions	6
C. Discriminatory Taxation of Railroads Does Not Violate the Fourteenth Amendment	9
CONCLUSION	12

TABLE OF AUTHORITIES

CASES Page

Alabama Great Southern Railroad Co. v Eagerton, 663 F.2d 1036 (11th Cir. 1981) 6
Burlington Northern Railroad Co. v. Bair, 766 F.2d 1222 (8th Cir. 1985) 6
Burlington Northern Railroad Co. v. City of Superior, 932 F.2d 1185 (7th Cir. 1981) 6
Burlington Northern Railroad Co. v. Oklahoma Tax Commission, 481 U.S. 454 (1987) 5
City of Boerne v. Flores, 521 U.S. 507 (1997) ..7, 10, 11, 12
CSX Transportation Inc. v. Board of Public Works, 138 F.3d 537 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 63 (1998) 8
Ex Parte Young, 209 U.S. 123 (1908) 6, 8
Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) 7
Florida Prepaid Post Secondary Education Expense Board v. College Savings Bank, —— U.S. ——, 119 S. Ct. 2219 (1999) 10
Goodyear Atomic Corporation v. Miller, 486 U.S. 174 (1998) 10
Nashville, Chattanooga and St. Louis Railway v. Browning, 310 U.S. 362 (1940) 9, 10, 11, 12
Oregon Short Line Railroad v. Department of Revenue, 139 F.3d 1259 (9th Cir. 1998) 8, 11, 12
Pennsylvania v. Union Gas Company, 491 U.S. 1 (1989) 6
Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 4, 6, 7
Union Pacific Railroad Co. v. Burton, 949 F. Supp. 1546 (D. Wy. 1996) 7

STATUTES

28 U.S.C. § 1254(1) 2
28 U.S.C. § 2403(a) 3
49 U.S.C. § 11501 .....*passim*
49 U.S.C. § 11501(b)(4) 2, 3
49 U.S.C. § 11503(b)(4) 4
66 Pa. C.S. §§ 2702 & 2704 3

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Pennsylvania Public Utility Commission, and individual commissioners of that commission, cross-petitioners herein, petition for a writ of certiorari to review the judgment of the United States Court of Appeals

for the Third Circuit entered in this case on March 31, 1998, the Court of Appeals denying rehearing on April 15, 1999. The Pennsylvania Public Utility Commission and individual commissioners, cross-petitioners herein, pray that the writ for certiorari should issue, however, only in the event that this court grants the petition for writ of certiorari at No. 99-86, this term.

REFERENCE TO OPINIONS DELIVERED IN THE COURT BELOW

The opinion of the United States Court of Appeals for the Third Circuit in *Wheeling and Lake Erie v. Public Utility Commission of the Commonwealth of Pennsylvania, et al.*, is reported at 141 F.3d 88.

JURISDICTION

The United States Court of Appeals for the Third Circuit entered its opinion in *Wheeling and Lake Erie Railroad Company v. Commonwealth of Pennsylvania, Public Utility Commission*, on March 31, 1998. The Court of Appeals for the Third Circuit denied rehearing by order entered April 15, 1999. The Commission files this conditional petition for a writ of certiorari pursuant to Rule 12.5 in response to the petition for writ of certiorari filed July 12, 1999 at No. 99-86 this term. This Court has jurisdiction to review the opinion of the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Statute at 49 U.S.C. § 11501(b)(4) states as follows:

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a state, subdivision of a state, or authority acting for a state or subdivision of a state may not do any of them:

(4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

STATEMENT UNDER RULE 29.4(b)

Since the proceeding draws into question the constitutionality of 49 U.S.C. § 11501(b)(4), an Act of Congress affecting the public interest and neither the United States nor any agency, officer, or employee thereof is a party, it is noted that 28 U.S.C. § 2403(a) may be applicable.

The United States Court of Appeals for the Third Circuit has, pursuant to 28 U.S.C. § 2403(a), previously certified to the Attorney General of the United States the fact that the constitutionality of such Act of Congress has been drawn into question.

STATEMENT OF THE CASE

This case began when the Pennsylvania Public Utility Commission (Commission) entered an Order on September 23, 1994 at Docket No. C-00823227 pursuant to 66 Pa. C.S. §§ 2702 and 2704, allocating the cost of construction of and assigning maintenance responsibility for the new highway bridge carrying Old Bower Hill Road over the facilities of the Wheeling and Lake Erie Railway Company in Scott Township, Allegheny County. The September 23, 1994 Order directed Wheeling and Lake Erie Railway Company to pay Scott Township three percent of the total construction costs incurred by Scott Township in replacing the highway bridge carrying Old Bower Hill Road over the facilities of Wheeling and Lake Erie Railway Company and Consolidated Rail Corporation. The Commission order allocated the remaining construction costs to the Pennsylvania Department of Transportation (seven percent), Consolidated Rail Corporation (three percent), and Scott Township (eighty seven per-

cent). The Commission Order also directed that the Wheeling and Lake Erie Railway Company pay Scott Township fifteen percent of the costs which Scott Township would incur maintaining the structure in the future. The Commission Order allocated the remaining maintenance costs between Conrail (fifteen percent) and Scott Township (seventy percent).

Wheeling and Lake Erie Railway Company filed a complaint in the United States District Court for the Western District of Pennsylvania against the Commission, the individual Commissioners, Scott Township, and James P. Mulligan, Chairman of the Board of Commissioners of Scott Township on October 20, 1994. The complaint alleged that the Commission Order of September 23, 1994 was a tax and was discriminatory pursuant to 49 U.S.C. § 11503(b)(4), now recodified at 49 U.S.C. § 11501 (b)(4). For purposes of clarity and consistency, this petition will refer to this statutory provision as 49 U.S.C. § 11501(b)(4).

On October 11, 1996, the District Court granted Wheeling and Lake Erie Railway Company's Motion for Summary Judgment, determined the Commission's order to be a discriminatory tax and issued an order enjoining the Commission from collecting any costs associated with the construction or maintenance of the Old Bower Hill Road Bridge from Wheeling and Lake Erie Railway Company. The Commission appealed the District Court's Order to the United States Court of Appeals for the Third Circuit. On appeal, the Commission raised the issue of its immunity from suit pursuant to the Eleventh Amendment in light of this Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). On March 31, 1998, the Court of Appeals issued a decision reversing the District Court, determining that the Commission's Order was not a tax within the meaning of 49 U.S.C.

§ 11501. The Court of Appeals also found that 49 U.S.C. § 11501 was validly enacted pursuant to Section 5 of the Fourteenth Amendment. Thus, the Court of Appeals held that the Eleventh Amendment did not bar the District Court from hearing the matter.

Wheeling and Lake Erie Railway Company filed a petition for writ of certiorari with this Court on July 14, 1999 at No. 99-86, this term. The Commission and individual Commissioners, file this conditional cross-petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

This Court Should Grant Certiorari Because the Court of Appeals' Determination That Congress Validly Enacted 49 U.S.C. § 11501, Prohibiting Discriminatory Taxation of Railroads, Pursuant to Section 5 of the Fourteenth Amendment Is Contrary to the Decisions of This Court That Have Held That Discriminatory Taxation of Railroads Does Not Violate the Equal Protection Clause of the Fourteenth Amendment.

This case addresses the issue of whether States are subject to suit in federal courts under 49 U.S.C. § 11501. The Commission contends it is immune from suit under the Eleventh Amendment because Congress enacted 49 U.S.C. § 11501 pursuant to the Commerce Clause.

A. History of 49 U.S.C. § 11501

Congress enacted 49 U.S.C. § 11501 as part of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act). Congress found when it enacted 49 U.S.C. § 11501, that the States overtaxed railroads and that the States' discriminatory taxation of railroads constituted an undue burden on interstate commerce. *Burlington Northern Railroad Co. v. Oklahoma Tax Commission,* 481 U.S. 454 (1987).

Since Congress enacted 49 U.S.C. § 11501, railroads nationwide have successfully used it to enjoin numerous States from enforcing discriminatory taxes against railroads. *Burlington Northern Railroad Co. v. Bair,* 766 F.2d 1222 (8th Cir. 1985) (personal property tax); *Alabama Great Southern Railroad Co. v. Eagerton,* 663 F.2d 1036 (11th Cir. 1981) (gross intrastate receipts tax), *Burlington Northern Railroad Co. v. City of Superior,* 932 F.2d 1185 (7th Cir. 1981) (ore dock tax). The Courts of Appeals have held that the States were subject to suit pursuant to 49 U.S.C. § 11501 in federal courts, that 49 U.S.C. § 11501 applies to a wide variety of discriminatory state taxes and that the federal courts could enjoin discriminatory State taxation of railroads. Recent decisions of this Court call into question the railroads' ability to subject States to suit in federal courts pursuant to 49 U.S.C. § 11501.

B. Recent Eleventh Amendment Decisions

In *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996) this Court overruled its decision in *Pennsylvania v. Union Gas Company,* 491 U.S. 1 (1989) and held that Congress could not abrogate state sovereign immunity under the Eleventh Amendment using the Commerce Clause. This court reasoned that since the Commerce Clause, as part of the Constitution, was subject to the Eleventh Amendment, Congress could not use the Commerce Clause to override State sovereign immunity based on the Eleventh Amendment. *Seminole* left intact only limited prospective relief against individual state officials under the doctrine of *Ex Parte Young,* 209 U.S. 123 (1908) where Congress enacted legislation pursuant to the Commerce Clause.

This Court in *Seminole* ruled that Congress could abrogate State sovereign immunity under the Eleventh Amendment using Section Five of the Fourteenth Amend-

ment. *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976). This Court reasoned that the Fourteenth Amendment specifically allowed Congress to enact legislation that would protect individual constitutional rights against state action and therefore could be used to abrogate state sovereign immunity. After *Seminole,* plaintiffs seeking relief from States in federal court alleged that the statute they were proceeding under was enacted by Congress pursuant to the Fourteenth Amendment.

This Court in *City of Boerne v. Flores,* 521 U.S. 507 (1997) held that Congress could enact legislation pursuant to the Fourteenth Amendment only where it was seeking to enforce existing constitutional rights. This Court found that the Fourteenth Amendment was only remedial and did not grant Congress the authority to create new constitutional rights via statute. Only this Court could determine the substance of the Constitutional rights that Congress could enforce. After *Boerne* and *Seminole,* plaintiffs seeking relief from States in federal courts could do so only if they could demonstrate that Congress enacted the statute they were proceeding under pursuant to the Fourteenth Amendment and that the statute enforced existing constitutional rights.

Since this court decided *Seminole,* several States have raised Eleventh Amendment sovereign immunity in response to suits brought against them pursuant to 49 U.S.C. § 11501. In *Union Pacific Railroad Company v. Burton,* 949 F. Supp. 1546 (D. Wy. 1996), the District Court ruled that Wyoming was immune from suit. After reviewing the legislative history of the 4R Act and 49 U.S.C. § 11501, the Court concluded that the statute had been enacted pursuant to the Commerce Clause. The Court also found that there was no evidence in the legislative history that the statute had been enacted to enforce constitutional rights under the Fourteenth Amendment.

Therefore, the Eleventh Amendment barred suit against the State of Wyoming, although not against individual state officials.

In *CSX Transportation, Inc. v. Board of Public Works,* 138 F.3d 537 (4th Cir. 1998), *cert. denied,* 119 S. Ct. 63 (1998), the Court of Appeals did not address the issue of State sovereign immunity from suits brought pursuant to 49 U.S.C. § 11501 but rather held that the District Court could enjoin individual state officials under *Ex Parte Young* and that such relief was complete. The Court refused to address the issue of whether Congress enacted 49 U.S.C. § 11501 pursuant to the Fourteenth Amendment.

In *Oregon Short Line Railroad v. Department of Revenue,* 139 F.3d 1259 (9th Cir. 1998) the Court of Appeals ruled that Congress enacted 49 U.S.C. § 11501 pursuant to the Fourteenth Amendment. The Court of Appeals stated that Congress was concerned about tax discrimination against railroads when it enacted 49 U.S.C. § 11501 and that the statute enforced the equal protection clause of the Fourteenth Amendment. The Court held that the statute is consistent with the Constitution, is adapted to its ends and does not provide remedies that are disproportionate to the goal of eliminating discrimination. The Court concluded that the Eleventh Amendment did not bar suit against the State of Oregon.

In this case, the Court of Appeals addressed the issue of whether Congress enacted 49 U.S.C. §11501 pursuant to the Fourteenth Amendment and thus whether the Eleventh Amendment barred suit against the Commonwealth of Pennsylvania. In its review of 49 U.S.C. § 11501, the Court of Appeals observed that the statute stated it was enacted because of Congress' concern that discriminatory taxation of railroads burdened interstate

commerce. Thus, it was clear that Congress enacted the statute pursuant to the Commerce Clause. However, the Court of Appeals also stated that in determining the sources of Congress' authority to legislate, it could look beyond the expressed constitutional basis in the statute. 141 F.3d at 92.

The Court of Appeals then held Congress validly enacted 49 U.S.C. § 11501 pursuant to Section Five of the Fourteenth Amendment because it was concerned with discrimination against railroads in violation of their equal protection rights under the Fourteenth Amendment. 141 F.3d at 93. The Court stated that Congress intended that the statute enforce the equal protection clause of the Fourteenth Amendment. It also found Congress had the discretion to determine that railroads need special protection from tax discrimination. The Court held that the remedies provided by the statute were not out of proportion to their objective. Finally the Court concluded that 49 U.S.C. § 11501 did not substantively change any constitutional protections. The Court of Appeals' ruling on this issue is contrary to previous rulings of this court.

C. Discriminatory Taxation of Railroads Does Not Violate the Fourteenth Amendment.

Before Congress enacted 49 U.S.C. § 11501, this Court ruled that discriminatory taxation of railroads did not violate the equal protection clause of the Fourteenth Amendment. *Nashville, Chattanooga and St. Louis Railway v. Browning*, 310 U.S. 362 (1940). In that case, this Court held that a State taxing railroads at a higher rate than other taxpayers did not violate the equal protection clause of the Fourteenth Amendment. This Court held that States may classify property for taxation, may tax classes of taxpayers at different rates and may treat railroads and other utilities differently from other tax-

payers. This Court concluded that these kinds of tax schemes did not violate the Fourteenth Amendment. 310 U.S. at 368-369. This Court has not overruled or otherwise reversed its ruling in *Browning*. The ruling is controlling on this issue now and would have been controlling when Congress enacted 49 U.S.C. § 11501.

Therefore, when Congress enacted 49 U.S.C. § 11501, it was not attempting to prevent unconstitutional discrimination. Congress is presumed to have been aware of this Court's determination in *Browning* and the cases cited in *Browning* that discriminatory taxation of railroads by States did not violate the equal protection clause of the Fourteenth Amendment. *Goodyear Atomic Corporation v. Miller,* 486 U.S. 174 (1998). Congress could create new statutory rights under the Commerce Clause but it could not have enacted 49 U.S.C. § 11501 pursuant to the Fourteenth Amendment to remediate unconstitutional discrimination when this Court had already held that discriminatory taxation against railroads was constitutional. Congress failed to identify State conduct violating the Fourteenth Amendment's substantive provisions and could not have devised any scheme to prevent that conduct because the States' discriminatory taxation of railroads did not violate the equal protection clause. *Florida Prepaid Post Secondary Education Expense Board v. College Savings Bank,* —— U.S. —— 119 S. Ct. 2219 (1999).

In order for Congress to enact 49 U.S.C. § 11501 pursuant to the Fourteenth Amendment, it would have to change the substantive constitutional rights of railroads regarding tax discrimination. This Court has ruled in *Boerne* that Congress cannot enforce constitutional rights under the Fourteenth Amendment by changing the substance of those rights. In *Boerne,* this Court held that

Congress can only enact legislation pursuant to Section 5 of the 14th Amendment to enforce existing constitutional rights as determined by this Court. Congress cannot independently define or expand the scope of those constitutional rights by statute.

This is where the Courts of Appeals in both *Oregon Short Line* and this case are wrong. Both mistake what is a substantive change in constitutional rights for a remedial statutory enforcement of existing constitutional rights. The Court in *Oregon Short Line* cited *Browning* and stated that some of the practices prohibited by 49 U.S.C. § 11501 might have been sustainable against equal protection challenge but then held that Congress could eliminate all railroad discrimination even if it eliminated more practices than this Court would have. 139 F.3d at 1267. This reasoning is an admission that Congress has statutorily enforced constitutional rights under the Fourteenth Amendment by changing the substance of those rights.

The Court in this case does not cite *Browning* or any of the cases cited in *Browning*. Rather, the Court cites *Boerne* and concludes that *Boerne* does not affect its result. The Court states that 49 U.S.C. § 11501 does not substantively change any constitutional protections. 141 F.3d at 94. This statement occurs one page after the Court quotes another Court of Appeals' statement that prior to the passage of 49 U.S.C. § 11501, States could constitutionally classify railroads differently from other taxpayers without violating the equal protection clause of the Fourteenth Amendment. Again, this is an acknowledgment that Congress has statutorily enforced a constitutional right under the Fourteenth Amendment by changing the substance of that right. This Court's decision in *Boerne* renders legislation attempting to change the substance of constitutional rights under the Fourteenth Amendment unconstitutional.

In direct contradiction to *Boerne*, by finding that Congress enacted 49 U.S.C. § 11501 pursuant to Section 5 of the 14th Amendment, the Court of Appeals held that Congress may define or expand constitutional rights by statute. The Court of Appeals' reasoning turns state conduct that this court in *Browning* held was constitutional-discriminatory taxation of railroads-into unconstitutional state conduct. The Court of Appeals' decision on this issue is clearly contrary to the prior decisions of this Court as is the Court of Appeals' decision in *Oregon Short Line*. Given the railroads' nationwide use of 49 U.S.C. § 11501 against the States and the failure of the Court of Appeals to follow the prior decisions of this Court, this Court should grant the Commission's cross-petition for writ of certiorari.

CONCLUSION

If this Court grants a petition for writ of certiorari in No. 99-86, it should also grant this cross-petition. If the petition in No. 99-86 is denied, this cross-petition should also be denied.

Respectfully submitted,

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